United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

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Pls

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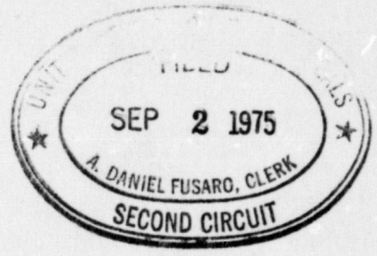

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Joe L. Johnson,

Appellant

vs.

United States of America,

Appellee.

On Appeal from United States District Court for the Eastern District of New York

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Supplemental Brief of Appellant for Clarification of Issues on Appeal and in Opposition to Appellee Brief

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For The Appellee

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Supplemental Statement of Issues for Clarification

The Appellant would move this Court to accept this Supplemental Brief on Appeal in order that the issues on Appeal may be clarified, and to show the court, that once again the Government, in their "Brief for Appellee" is attempting to "becloud" the issues, thereby, depriving the Appellant, once again, of the effective assistance of counsel (himself). The Appellant is faced with the Herculeon task; one that is rarely, fairly adjudicated, because of the oft-quoted part-sentence that makes all arguments negative "unless (counsel)deficiencies were such 'to shock the conscience of the court!"

Since the Constitution that has given us the right to counsel was

Since the Constitution that has given us the right to counsel was drafted by attorneys; our prosecutors must be qualified attorneys; the District Court Judges must have, at some time, been an attorney; and, of course, the same holds true of the members of this court. Therefore, to find a issue that would "shock the conscience of the court", when weighed against one of the brethren, is indeed, a task of Herculeon proportion.

However, due to our judicial system's ever-increasing determination to preserve the Constitutional Rights of the "least of its citizens", the Appellant is confident that he will have "his day in court" unencumbered by ineffective counsel, prejudiced courts, and "unfettered juries", and it is this that the Appellant seeks.

THE ISSUES PRESENTED FOR REVIEW

The District Court Erred in not granting an Evidentiary Hearing on Appellant's Motion pursuant to 28 U. S. C. Section 2255.

Why did the District Court Err?

Because:

1. The Government, in its answer to the Appellant's Motion to vacate sentence, presents in their "Affidavit in Opposi-

tion" acts that are not a part of the "files and the record of the case"(see Government's appendix A-71d (6)). Contrary to this court's holding in Taylor vs. United States 487 F.2d 307 (1973).

2. The Appellant, in his Motion to vacate sentence pursuant to 28 U. S. C. Section 2255 made a prima facie showing that he had been denied several basic Constitutional Rights during the process of the proceedings against him, and these Constitutional deprivations were not fully adjudicated at his original Appeal.

Because:

During the course of the trial Appellant was denied the effective assistance of counsel, with the full knowledge and sanction of the trial court.

The Sixth Amendment to the Constitution guarantees counsel to all defendants in criminal cases. The implication of this right has been interpreted by higher courts to mean that the right not only requires that a defendant be, absent a knowledgable waiver, represented by counsel at trial, but at all stages of the prosecution. Further, that the right

to counsel carries with it the right to "effective counsel", not perfect, or errorless, but one "unfettered" by interests or obligations to others that would preclude counsel from being an advocate on behalf of his client. The interpretation of the court's that counsel's representation must be such "to shock the conscience of the court" to be deemed ineffective, like all other decisions cannot be taken as an absolute guideline for all young, aspiring, assistant United States Attorneys to quote, "with a finalized smile" unless they are qualified psychiatrists that can"analyze" the conscience of a particular "court", for actions that might be abhorant to one jurist, may be a common accepted practice for another.

In the instant case, the trial court issued the order for telephonic interception in a preceding case, United States vs. Bynum 475 F.2d 832 (C A 2), and testified concerning the order, as a witness for the prosecution wherein the intercepted tapes contained reference to this Appellant. Further, the court had full knowledge of the investigation that had been conducted against Petitioner's counsel's involvement in alleged "attempted bribery" charges while defense counsel in Bynum, supra. Under these

circumstances, the court was mandated to conduct a hearing in the presence of Appellant to determine whether the existence of this "taint" was known to Appellant, and if known, whether Appellant was confident that this would not impede the effectiveness of counsel's representation, since there was a "common" relationship between counsel and the court, to the extent that there was a conflict between the court and counsel in the Bynum, supra, case that could "flow -as-prejudice" to the instant case. The Government states in its reply brief that no prejudice could exist as the court is constantly faced with defendants who appeared in other cases before the court, or who had testified in other trials which the court was presiding over, However, such a comparison is erroneous as to its application to the instant case, as here, the court was a witness for the prosecution not an impartial "referee" and such "tainted" knowledge of Appellant's involvement in prior investigation of which the court had "first hand " knowledge, and as such would influence the court in "crucial decision making" such as:

1. Withholding Evidence
2. Speedy Trial Dismissal
3. The Court did not give Petitioner the right to call witnesses in his favor
4. Counsel Conduct at Allocution
5. Sentencing
6. Invading the Providence of the Jury

To assume differently would be to place a "cloak of inhumanity" over the court which is unfair to both the integrity of the Court and the protection of the Constitutional Rights of this Appellant.

Finally, to dispense, with finality, the issue of previous adjudication of issues as a bar to collateral proceedings. This issue is erroneous upon a showing of ineffectiveness of counsel, as once such an allegation is shown to be a fact, then the whole proceeding is null and void as if it never existed, as when counsel was shown to be ineffective or acting with a conflict of interest, then the only cure is a new trial.

Counsel proceeded on Appeal after having been dismissed by the Appellant. The reason for dismissal was that counsel, who was appointed under the Criminal Justice Act, kept demanding more money to represent the Appellant properly, and the Appellant had paid him all the money he

could borrow and was not able to borrow any more and did not want to be represented by underpaid, dis-satisfied counsel on Appeal.

Wherefore for just cause shown, Appellant prays that this court grant the relief prayed for by the Appellant, and remand this cause to the District Court for a new trial, before a different Judge, consistent with this Court's holding in the United States vs. Rosner (C A 2nd Cir. 1973).

Respectfully submitted,

Joe L. Johnson, Appellant
In Propria Persona

State of Georgia)
) SS
County of Fulton)

SWORN TO AND SUBSCRIBED BEFORE ME THIS _____ DAY OF AUGUST, 1975.

PAROLE OFFICER

STATE OF GEORGIA)
) SS
COUNTY OF FULTON)

AFFIDAVIT

I, JOE L. JOHNSON, petitioner herein, first being sworn under and according to law, depose and say that I am the Petitioner in the preceeding and that under the penalties of perjury that the foregoing Affidavit is true and correct to the best of my knowledge and belief.

Respectfully submitted,

Joe L. Johnson

Joe L. Johnson, In Propria Persona
Box PMB - 74274-158
Atlanta, Ga. 30315

SWORN TO AND SUBSCRIBED BEFORE ME THIS _____ DAY OF AUGUST, 1975.

_____
PAROLE OFFICER